Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 425

SCHIEFFELIN & CO. and BEITZELL & CO., INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals entered in Customs Appeal No. 5339.

OPINIONS BELOW

The opinion of the United States Customs Court is reported at 61 Cust. Ct. 397. The opinion of the Court of Customs and Patent Appeals is C.A.D. 978; it is reported in 4 Customs Bulletin, No. 19, page 33 and 424 F. 2d 1396; this opinion is appended hereto, pages A-1 to A-18.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on April 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTIONS PRESENTED

Is it contrary to the "national treatment" clause of the treaty with Ireland for the United States to assess internal revenue tax on bottled Irish whisky on a basis which exacts more tax than is assessed on a comparable quantity of the like domestic product and which basis (a) does not in practice apply to bulk domestic whisky which is produced for the domestic market, and (b) cannot, as a matter of law, apply to bottled domestic whisky which is produced for the domestic market? If that question is answered in the affirmative, is the imported whisky subject to import duty on the same quantity as is subject to internal revenue tax, i.e., on the basis of proof gallons?

Treaty of Friendship, Commerce and Navigation between the United States of America and Ireland (1 U.S.T. 788, 797, 801; entered into force September 14, 1950):

ARTICLE XVI

1. Products of either Party shall be accorded, within the territories of the other Party, national and most-favored-nation treatment in all matters affecting internal taxation and sale, distribution, storage and use.

ARTICLE XXI

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded thereon, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

Treaty with Great Britain to regulate commerce (8 Stat. 228; entered into force July 3, 1815):

Art. 2. No higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce, or manufacture, of his Britannick majesty's territories in Europe, and no higher or other duties shall be imposed on the importation into the territories of his Britannick majesty in Europe of any articles the growth, produce, or manufacture, of the United States, than are or shall be payable on the like articles being the growth, produce, or manufacture, of any other foreign country; * * *

Internal Revenue Code of 1954 (U.S. Code, Title 26):

Sec. 5001. (a) Rate of tax

(1) General.

There is hereby imposed on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of $10.50 on each proof gallon or wine gallon when below proof * * *

Section. 5006. Determination of tax.

(a) Requirements.

(1) In general.

Except as otherwise provided in this section, the internal revenue tax on distilled spirits shall be determined when the spirits are withdrawn from bond. * * *

Sec. 5233. Bottling of distilled spirits in bond.

(a) General.

Distilled spirits stored on bonded premises which have been duly entered for bottling in bond before determination of tax or for bottling in bond for export, shall be dumped, gauged, bottled, packed, and cased in the manner which the Secretary or his delegate shall by regulations prescribe. * * *

(b) Bottling requirements

(1) The proprietor of a distilled spirits plant who has made entry for withdrawal of distilled spirits for bottling in bond may, under such regulations as the Secretary or his delegate shall prescribe, * * *

(B) reduce the proof of such spirits by the addition of pure water only to 100 proof for spirits for domestic use, or to not less than 80 proof for spirits for export purposes * * *

(4) Nothing in this section shall authorize the labeling of spirits in bottles contrary to regulations issued pursuant to the Federal Alcohol Administration Act (49 Stat. 977; 27 U.S.C., chapter 8), or any amendment thereof.

Sec. 7852. Other applicable rules.

* * *

(d) Treaty obligations.

No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title. (Aug. 16, 1954, ch. 736, 68A Stat. 916)

Federal Alcohol Administration Act (U.S. Code, Title 27)

Sec. 206. Bulk sales and bottling.

(a) Offenses

It shall be unlawful for any person –

(1) To sell or offer to sell, contract to sell, or otherwise dispose of distilled spirits in bulk except, under regulations of the Secretary of the Treasury, for export or to the following, or to import distilled spirits in bulk except, under such regulations, for sale to or for use by the following: A distiller, rectifier of distilled spirits, person operating a bonded warehouse qualified under the internal-revenue laws or a class 8 bonded warehouse qualified under the customs laws, a wine-maker for the fortification of wines, a proprietor of an industrial alcohol plant, or an agency of the United States or any State or political subdivision thereof.

(2) To sell or offer to sell, contract to sell, or otherwise dispose of warehouse receipts for distilled spirits in bulk unless such warehouse receipts require that the warehouseman shall package such distilled spirits, before delivery, in bottles labeled and marked in accordance with law, or deliver such distilled spirits in bulk only to persons to whom it is lawful to sell or otherwise dispose of distilled spirits in bulk.

(3) To bottle distilled spirits unless the bottler is a person to whom it is lawful to sell or otherwise dispose of distilled spirits in bulk.

* * *

(c) "In bulk."

The terms "in bulk" mean in containers having a capacity in excess of one wine gallon.

Tariff Schedules of the United States, Schedule 1, Part 12, Headnote 3 (19 U.S.C. 1202).

3. The duties prescribed on products covered by this part are in addition to the internal revenue taxes imposed under existing law or any subsequent Act. The duties imposed on products covered by this part which are subject also to internal revenue taxes are imposed only on the quantities subject to such taxes.

STATEMENT OF THE CASE

The internal revenue tax on whisky and other distilled spirits is based primarily on alcoholic content. The tax rate is $10.50 per proof gallon, a proof gallon being a wine gallon (231 cubic inches) containing 50 percent of alcohol.[1] The higher the alcoholic content, the higher the tax. The tax on 100 gallons of 120 proof whisky (60 percent alcohol) is $1,260.00. The tax on 100 gallons of 190 proof spirits (95 percent alcohol) is $1,995.00.

Only relatively small quanitites of spirits are sold at retail at 100 proof or above. Most have their proof reduced (by addition of water) before bottling. Only bottled spirits can be sold at retail. Distilled spirits bottled in the United States average about 85 proof.

When the proof of the spirits is reduced by the addition of water, the distiller gets more gallons for bottling. One hundred gallons of 120 proof whisky yield 139.5 gallons of bottled 86 proof whisky. One hundred gallons of 190 proof spirits yield 220.9 gallons of bottled 86 proof spirits. In either case the internal revenue tax is equal to $9.03 per bottled gallon of 86 proof whisky or other spirits.

On the other hand, if the proof of the spirits at time of tax determination is less than 100 proof, the tax is assessed as though the spirits were 100 proof. This results from the provision of IRC 5001 which imposes the tax at $10.50 per proof gallon, or *wine gallon when below proof*.

When distilled spirits are produced in, or imported into, the United States, they are put into bond, that is, under government custody, to assure payment of the tax. Sec. 5006 of the Internal Revenue Code provides that the tax is to be determined upon withdrawal from bond; that is to say, the tax is based on the quantity and condition of the spirits upon withdrawal from bond.

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[1] Spirits containing 50 percent of alcohol are called 100 proof; spirits containing less are called below proof or underproof.

In actual practice spirits produced in the United States are withdrawn from bond at proof or above and they are accordingly assessed on the proof gallon basis. The imports in issue, as are practically all bottled imports, are below proof and thus are assessed on wine gallons, that is, as though they were 100 proof.

Petitioners are importers of Scotch whisky and Irish whisky, both bottled at 86 proof. The imports were assessed at $10.50 per bottled gallon, the same tax that would have been payable had they been 100 proof; this is $1.47 per bottled gallon more than is paid on 86 proof domestic spirits. Import duty was also assessed under Schedule 1, Part 12, Tariff Schedules of the United States at the rate of $1.02 per bottled gallon.

Petitioners paid the liquidated taxes and duties and protested the assessments under section 514 of the Tariff Act of 1930. The papers were transmitted to the United States Customs Court which has jurisdiction under 28 U.S.C. 1583. The original protests were limited to the legality of the internal-revenue-tax assessment; by timely amendment, the legality of the tariff-duty assessment was also brought into issue. When petitioners moved for the amendment, the Government opposed the motion. However, the court granted the motion to amend and the Government did not appeal.

The Government defended assessment of more tax on the imports by noting that IRC 5001 imposes tax at the rate of $10.50 on each proof gallon or wine gallon when below proof. The imports in question are below proof. Petitioners contended such assessment on Irish whisky is contrary to Article XVI of the treaty with Ireland because the tax treatment of the Irish whisky is less favorable than the tax treatment of the like domestic product.

Petitioners also contended that the Scotch whisky is entitled to the same treatment as the Irish whisky by virtue of the most-favored-nation treaty with Great Britain. The Government has agreed that if Irish whisky is entitled to

assessment on proof gallons. Scotch whisky is entitled to the same treatment.

It is agreed that the imported whiskies are like bottled distilled spirits of equivalent proof manufactured in the United States. (R. 11; Stip. par. 2)[2] It is also agreed that producers in the United States who market below proof bottled whisky withdraw their distilled spirits from bond at or above proof and tax is determined on a proof gallon basis. (R. 12; Stip. par. 5) The demand in the United States is predominantly for under proof spirits. (R. 12; Stip. par. 7)

In addition, Petitioners have demonstrated that the wine gallon tax (which resulted in taxation of the 86 proof imports as though they were 100 proof) cannot as a matter of law apply to domestic bottled spirits produced for marketing in the United States.

The Government of Ireland and Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland have filed statements below in support of the position of Petitioners.

The Court of Customs and Patent Appeals felt constrained by the doctrine of *stare decisis* to follow its decision in *Bercut-Vandervoort & Co., Inc. v. United States*, 46 CCPA 28, cert. den. 359 U.S. 953. That court held the tax did not discriminate against imports.

REASONS FOR GRANTING THE WRIT

This court has declared principles for judicial interpretation and upholding of treaties. Treaties made by proper authority being law, courts of justice have no right to annul or disregard any of their provisions. It is their duty to interpret and administer them according to their terms

[2] References to the record are to the printed record in the Court of Customs and Patent Appeals.

Clark v. Bradeii, 16 Howard 635, 657) and in a broad and liberal spirit calculated to make for perpetual amity. (*Tucker v. Alexandroff*, 183 U.S. 424, 437) "When a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other more favorable to them, the latter is to be preferred." (*Bacardi Corp. v. Domenech*, 311 U.S. 150)

The lower courts have failed to take notice of these principles and in the process have nullified *pro tanto* the national treatment clause of the treaty with Ireland.

Furthermore, the Court of Customs and Patent Appeals has apparently repudiated the one significant finding that lent credence to the precedent on which it relies. In *Bercut*, that court found there was a "consistent and uniform application of the statute to domestic distilled spirits and imported distilled spirits." (46 CCPA 36) In the pending case, the same court rejects as immaterial our showing that the wine-gallon tax cannot apply to domestic bottled spirits, saying that "*Bercut* was in no way premised on a view that domestic under proof spirits would or could ever be subject to the internal revenue tax in that condition." (Post p. A-12) We suggest that the rationale of *Bercut* has been perverted because it is impossible that a statute which applies a tax to imports but which does not apply it to the domestic article could in fact be applied "consistently and uniformly" to both domestic and imported products. And if the provision that exacts higher tax on the import could not apply to the like domestic product, how could it be denied that the import is accorded less favorable treatment than the domestic product?

I. RESOLUTION BY THIS COURT OF THE PENDING QUESTION ON NATIONAL TREATMENT IS OF GREAT IMPORTANCE TO THE FOREIGN POLICY OF THE UNITED STATES

This case presents an important question of federal law, a question that has not been, but should be, decided by this court.

The treaty clause guaranteeing that imported goods will be granted national treatment with respect to internal taxation has been a key feature of United States foreign economic policy for many years, at least as far back as the treaty with Germany that took effect in 1925. (48 Stat. 2132, 2139, Art. VIII) It was originally developed as a device to keep tariff protection or its equivalent out of the internal revenue laws and to confine protection to the tariff laws.

Later, with development of the tariff-reduction program under the Trade Agreements Act of 1934, the national treatment clause was found to be a necessary adjunct of trade agreements—necessary to safeguard tariff concessions against impairment or nullification by way of internal revenue taxes which discriminate against imports. ("Operation of the Trade Agreements Program, June 1934 to April 1948," a report by the U.S. Tariff Commission, Part I, page 10, Part II, page 45; see also Senate Finance Committee Hearings on H.R. 1612, 82nd Cong., Part 2, page 1195, and Department of State Publication 2983, page 196, comments on Art. III of General Agreement on Tariffs and Trade.)

Whisky is the most valuable single product exported from the United Kingdom to the United States. The argument has been going on for a generation as to whether the United States method of computing the tax on imported whisky is consistent with or contrary to the national treatment clause in various treaties. As we shall demonstrate, the wine gallon tax does not apply to domestic production

for the U.S. market, but it does apply to imports. The tax discriminates against imports and affords protection to domestic industry.

Resolution of the question by this court will clear away the fog and enable the United States and its trading partners to determine whether the national treatment clause as developed to date is worthwhile.

II. ASSESSMENT OF THE WINE GALLON TAX IS CONTRARY TO THE TREATY WITH IRELAND

The treaty with Ireland guarantees that Irish products will be accorded national treatment in the United States in all matters affecting internal taxation. This means that Irish products will be taxed on terms no less favorable than goods produced in the United States. Although we have demonstrated that the wine gallon tax does not in fact apply to bulk domestic whisky and cannot in law apply to bottled domestic whisky, the court below rejected our demand for equal treatment because it had previously found that the wine-gallon tax under prior law did not conflict with the provision for non-discriminatory treatment in the General Agreement on Tariffs and Trade in a case which failed to disclose the non-application of the wine gallon tax to bottled domestic spirits.

A. The prior litigation

The *Bercut* case involved sec. 2800 of the Internal Revenue Code of 1939 and Art. III of the General Agreement on Tariffs and Trade which are parallel to sec. 5001 of the Internal Revenue Code of 1954 and Art. XVI of the Irish Treaty involved in the pending case. The Court of Customs and Patent Appeals upheld assessment of the wine gallon tax on imported under proof bottled spirits against the claim that imports were taxed more than domestic articles in contravention of the national treatment clause of the GATT. The Court held that sec. 2800 established two

classes of spirits for purpose of taxation: (a) proof or above proof spirits and (b) below proof spirits, that the imports could have been taxed on proof gallons, like domestic spirits, if they had been entered above proof, and that the application of the statute was consistent and uniform for both imported and domestic spirits. (46 CCPA 28, 32, 36) This court denied certiorari. (359 U.S. 953) In *China Liquor Distributing Co. v. United States* (52 CCPA 1) the court below followed its decision in *Bercut* and this court denied certiorari. (380 U.S. 962)

Petitioners have undertaken to distinguish the *Bercut* precedent as a matter of law, chiefly by establishing that the wine gallon tax cannot legally apply to below proof bottled spirits produced in the United States for the domestic market. Also, petitioners point out that even though imported spirits are assessed on proof gallons if imported above proof this means only that the wine gallon tax is not discriminatory on bulk imports and this does not excuse the discrimination against bottled below proof imports.

The court below observed that amicus[3] "accepts the premise of the Customs Court that *Bercut* is not distinguished [from the present case] upon the relevant facts or the law," (p. A-10, post). Petitioners suggest that the Court below thoroughly misunderstood the position of amicus. On page 3 of its brief is the statement: "Her Majesty's Government adopts as its own the position taken in Appellants' brief before this Court." And on page 6 of amicus' brief: "For the sake of its main argument in this brief, Her Majesty's Government accepts the premise that *Bercut* 'is not distinguished upon the relevant facts or the law.'" We suggest that accepting a premise for the sake of argument is a far cry from its unqualified acceptance. Furthermore, amicus' adoption of Appellants' arguments that *Bercut* is

[3]Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

distinguished on the law fully contradicts the lower court's assumption.

B. The wine gallon tax applies to bottled imports but not to the like domestic articles.

Although IRC 5001, considered alone, appears to apply equally to domestic and to imported spirits when considered in the context of the entire statute this is not the case. The wine gallon tax cannot legally apply to domestic spirits bottled for the United States market. The wine gallon tax applies only to imports, and they thereby pay more tax.

IRC 5006 provides for determination of tax on withdrawal from bond. The 1939 Code considered in *Bercut* contained no such provision.

IRC 5233 precludes withdrawal from bond for consumption of domestic spirits bottled below proof. Therefore, such spirits cannot be tax determined below proof and cannot be taxable on wine gallons, the wine gallon tax being legally applicable only to spirits that are below proof at time of tax determination.

The Court of Customs and Patent Appeals, although appearing to have found this to be the case, nevertheless held that *Bercut* was in no way premised on a view that domestic under proof spirits would or could ever be subject to tax in that condition. (Page A-12 post) Although we had thought differently, based on the court's statement in *Bercut* that the statute applied uniformly and consistently to domestic spirits and imported spirits (46 CCPA 36), we will defer to the Court of Customs and Patent Appeals as interpreter of its own opinions. But if the court in *Bercut* did not consider relevant that the tax could not apply equally to domestic and imported spirits, how could it justify its finding that the tax was not discriminatory against the import? We suggest that by taking away the reason for *Bercut*, the court has stripped that case of its standing as a precedent.

As mentioned above, the fact that imported spirits are taxable on proof gallons if imported above proof means only that the wine gallon tax does not discriminate against bulk imports. But this factor does not excuse or mitigate the discrimination against bottled imports because the Irish treaty guarantees equality of treatment to all imports, finished as well as unfinished goods. Courts cannot dispense with any conditions or requirements of a treaty or take away any part of any stipulation upon the notion of equity or convenience or substantive justice. (*The Amiable Isabella*, 6 Wheaton 1)

The fact that the wine gallon tax applies only to bottled imports and not to domestic bottled spirits means that this tax is equivalent to tariff protection to domestic producers. The domestic producers have confirmed this by their own testimony.

After some years of complaints by importers and by foreign governments about the discriminatory nature of the wine gallon tax, the U.S. Treasury Department proposed its repeal in 1951. (H.R. 1535, 82nd Cong., sec. 24(d))

Importers contended at the hearings of the House of Representatives Committee on Ways and Means that the wine gallon tax should be eliminated because it was discriminatory. Domestic producers denied it was discriminatory because importers could bring in their spirits in bulk and bottle them here and thus avoid the wine-gallon tax.

In a statement before the Committee, a witness speaking for twenty-two domestic producers of distilled spirits testified in opposition to section 24(d):

> PROPOSAL IS IN EFFECT A TARIFF REDUCTION AND NOT A SIMPLIFICATION OF CUSTOMS PROCEDURE
>
> The proposal stripped of all its fancy discrimination masquerade is simply an attempt to effect a further reduction in the import duty for foreign shippers of cased whisky. (Hearings, page 380)

* * *

> The net effect of the proposed measure would be to reduce the present tariff protection * * *. (Hearings, page 384)

The Resident Commissioner of Puerto Rico also testified in opposition to section 24(d):

> I appear to call attention to the effect which sec. 24 of H.R. 1535 will have on Puerto Rico's economy. Whether section 24 may properly be classified as customs simplification or not, I shall not discuss. I wish to say, however, that it certainly means a reduction in the tariff protection now afforded in the market of the United States to Puerto Rican rum products with which Cuban rum products compete. (Hearings, page 391)
>
> * * *
>
> Section 24 actually means nothing more or less than a further reduction in the protection granted to domestic liquors, including Puerto Rican rum, as against foreign competition. (Hearings, page 393)

This is "weighty evidence" of the situation which the proposed legislation was designed to change. (*Shapiro v. Thompson*, 394 U.S. 618, 628) It is clear that elimination of the wine-gallon tax (which was successfully resisted by the domestic producers in 1951) would have been equivalent to a tariff reduction. It is equally clear that retention of the tax means a continuation of a discrimination against imports because, unless there is discrimination against imports, there is no protection of domestic industry.

C. Being contrary to the treaty with Ireland the provision of IRC 5001 "or wine gallon when below proof" may not be applied to Irish whisky by virtue of IRC 7852(d).

In a classic *non sequitur*, the lower court has imputed to Congress an intent not to have the wine gallon tax invalidated by IRC 7852(d). It goes like this:

> Referring specifically to the present case, the classification of spirits for internal revenue purposes in the two categories of proof gallon and wine gallon amounts but to a continuation of a practice long established at the time Congress passed the 1954 Internal Revenue Act specifically continuing it. The Irish treaty was already in force at that time. It is apparent that Congress had knowledge through the hearings on the Customs Simplification Act of 1951, discussed at length by appellants and *amicus*, of the controversy relating to the application of the wine gallon tax to bottled imported underproof spirits. In those circumstances, we cannot conceive that Congress, in including in the 1954 Internal Revenue Code, Sec. 7852(d), denying effect to provisions "contrary to any treaty obligation," intended it to apply to the express provision for the wine gallon rate in Sec. 5001. (Page A-14 post)

The court's difficulty is that it misconstrued the scope of Sec. 7852(d). The opinion's partial quotation from the section omits the phrase that limits the section to a treaty obligation * * * "in effect on the date of enactment of this title."

Congress fully appreciated the possibility that a section of the Act might conflict with an existing treaty and intended to subordinate the former to the latter; it cannot reasonably be assumed that Congress also intended to preclude the application of the Sec. 7852(d) to a section within the perimeter of its coverage.

If it can be said that Congress could not have intended the section to apply to the wine gallon provision, it can also be said that the section was not intended to apply to some other possibly conflicting provision then for what purpose was the section included? The Congress could only have intended its potential applicability to reach all sections within its coverage.

If, on the other hand, the emphasis is put on Congress' knowledge of the effect of the wine gallon tax because of prior testimony, this is no reason for holding sec. 7852(d) inapplicable because we must presume that Congress knows what it is doing in all cases, whether the incident is covered by specific testimony or not. It does not seem appropriate for the court to suggest that Congress suffers from lack of knowledge.

On the other hand, the determination of whether a particular provision of law is in conflict with a treaty is a judicial function and the reenactment of the wine gallon tax in 1954 in the face of the treaty with Ireland is not evidence of a Congressional determination that there is no conflict. This is a matter Congress has left to the judiciary, without any expression or implication of Congressional intent.

Since the provision "or wine gallon when below proof" cannot legallly be applied to these imports, they are taxable under the other provision of IRC 5001, per proof gallon, the same as domestic spirits.

III. THE COURT OF APPEALS DECISION IN THIS CASE IS IN CONFLICT WITH A DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

In a case strikingly parallel to the pending case, the Court of Appeals for the Ninth Circuit reached a conclusion opposite to that of the Court of Customs and Patent Appeals in the pending case. Section 3350 of the Internal Revenue Code of 1939 directed the levy "upon articles coming into the United States from the Virgin Islands, a

tax equal to the Internal Revenue tax imposed in the United States upon like articles of domestic manufacture." This provision for national treatment of Virgin Islands products with respect to U.S. taxation is comparable to the provisions of the Irish treaty which guarantee to Irish products treatment no less favorable that the treatment accorded in the United States, in like situations, to products of the United States.

Parrott & Co. v. United States, 156 F.2d 943 involved bottled below proof distilled spirits brought into the United States tax area from the Virgin Islands; such spirits were assessed internal revenue tax on wine gallons, as was the bottled below proof Irish whisky at bar. The taxpayer litigated and the Ninth Circuit Court held the spirits were taxable on proof gallons, not wine gallons.

The court below has rejected *Parrott* as a relevant precedent, saying that the language of sec. 3350 is "entirely different" from the treaty language. (Page A-13, post) We agree there are some differences in language (tax "equal to" versus tax "no less favorable"), but suggest that the principle of sec. 3350 is the same as the principle of Art. XVI of the Irish treaty and that the question in the pending case is the same as the question in *Parrott*.

CONCLUSION

The questions presented in this case are of such a nature that they can be resolved only by this court. If the national treatment clause is so fragile that it can be avoided by a simple device of timing of tax determination, as held by the lower courts, the sooner we know it the better; we cannot know the answer until this court has ruled. Further, the nations with which the United States has negotiated national treatment clauses may well be concerned that we have one concept for national treatment when products of a United States possession (Virgin Islands) are involved and

a much more restrictive concept when imports from foreign countries are involved.

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

(424 F.2d 1396)

Schieffelin & Co. and Beitzell & Co., Inc. v. The United States

No. 5339, C.A.D. 978

United States Court of Customs and Patent Appeals, April 23, 1970

Appeal from United States Customs Court, C.D. 3640.
[Affirmed] 57 CCPA

Edwin G. Martin, attorney of record, for appellant.
Ansel F. Luxford, amicus curiae, Morgan, Lewis & Bockius, of counsel.

William D. Ruckelshaus, Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *Glenn E. Harris* for the United States.

[Oral argument January 6, 1970 by Mr. Martin, Mr. Luxford and Mr. Harris]

Before Rich, *Acting Chief Judge*, Almond, Baldwin, Lane, *Associate Judges*; and McManus, *Chief Judge*, Northern District of Iowa, sitting by designation.

Baldwin, *Judge*, delivered the opinion of the court:

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

SCHIEFFELIN & CO. and BEITZELL & CO., INC., *Appellants,* v. THE UNITED STATES, *Appellee.*	)	October Term 1969. Customs Appeal No. 5339

April 23, 1970

BALDWIN, Judge.

This appeal is from the judgment of the United States Customs Court, Third Division,[1] overruling two consolidated protests relating to certain 86 proof bottled spirits, imported from Ireland and Scotland, respectively, between March 1964 and April 1965. As filed, the protests were directed only to the internal revenue tax, which was levied at the rate of $10.50 per wine gallon[2] under section 5001(a)(1) of the Internal Revenue Code of 1954, and the importers claimed that the tax should have been levied on a proof gallon basis at 86% of $10.50, amounting to $9.03 per wine gallon. Subsequent to submission of the cases, the Customs Court, on motion of appellants and over objections by the

[1] *Schieffelin & Co., et al. v. United States*, 61 Cust. Ct. 397, C.D. 3640 (1968).

[2] A "wine gallon" is a standard United States gallon containing 231 cubic inches. The term is generally applied to spirits that are less than 100-proof, i.e., less than 50 percent alcohol by volume. A gallon of 100 proof spirits is called a "proof gallon" and a gallon containing over 50 percent alcohol is designated "over proof" or "above proof."

government, allowed amendment of the protests by adding a paragraph which reads:

> Your assessment of tariff duties under item 168.45, Tariff Schedules of the United States, on the basis of wine gallons is illegal, null and void because it is contrary to headnote 3, Part 12, Schedule 1, T. S. U. S. Under that provision, duties on such products may be assessed only on the quantities legally subject to internal revenue taxes, namely on the basis of proof gallons.

The protests were submitted to the Customs Court upon a stipulation including the following:

> 1. That the merchandise in issue consists of bottled, below proof distilled spirits which are the manufacture of Scotland or Ireland, as hereinafter related, on which tax was assessed at $10.50 per wine gallon under section 5001, Internal Revenue Code.
>
> 2. That the merchandise in issue is like bottled distilled spirits of equivalent proof manufactured in the United States and that the merchandise in protests No. 66/24918 is like the merchandise in protest No. 66/70446.
>
> 3. That a proof gallon of distilled spirits contains 50 percent of alcohol by volume, and a proof gallon is called 100 proof, that is, the number of proof represents twice the percentage of alcohol.
>
> 4. That below-proof distilled spirits contain less than 50 percent of alcohol by volume and the number of proof represents twice the percentage of alcohol. For example spirits containing 43 percent of alcohol are called 86 proof.
>
> 5. That in the United States, the practice of producers of domestic below-proof bottled distilled spirits is to withdraw spirits from bond at or above proof and have the taxes under sec. 5001, Internal Revenue Code, determined on the proof-gallon basis. Thereafter water is added to reduce the proof to the desired level before bottling. In recent years, all

distilled spirits legally bottled in the United States have averaged about 85 proof. (Statistical Releases, Alcohol and Tobacco Tax Division, U.S. Treasury Department).

6. That the assessment on below-proof bottled distilled spirits on the basis of wine gallons requires payment of higher taxes than would be payable on the basis of proof gallons.

7. That over 90 percent of domestic distilled spirits legally produced for consumption in the United States are withdrawn from bond in bulk at or above proof and are taxed on proof gallons. Over 90 percent of the distilled spirits legally sold at retail in the United States are bottled below proof.

8. That distilled spirits cannot be legally sold in the United States at retail in bulk; only bottled distilled spirits may legally be sold at retail.

9. That Scotland is one of His Brittannick Majesty's territories in Europe within the meaning of the Treaty of 1815 referred to in the protest.

10. That the merchandise in Protest No. 66/70446 consists of bottled distilled spirits the manufacture of Ireland, is 86 proof, and amounts to 116,800 wine gallons on which tax was assessed.

11. That the merchandise in Protest No. 66/24918 consists of bottled distilled spirits the manufacture of Scotland, is 86 proof and amounts to the following quantities:

A.	Entry No. 81328:	713.400 wine gallons
B.	Entry No. 56321:	2398.800 wine gallons
C.	Entry No. 81342:	354.600 wine gallons
D.	Entry No. 87136:	475.400 wine gallons

* * *

Section 5001(a)(1) of the Internal Revenue Code of 1954, 68A Stat. 595, as amended, 26 USC 5001(a)(1), reads in pertinent part:

(a) Rate of tax

(1) General. There is hereby imposed on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of $10.50 on each proof gallon or wine gallon when below proof * * *

Section 7852(d) of the Internal Revenue Code, 68A Stat. 922, 26 USC 7852(d) provides:

(d) Treaty obligations.

No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title.

Section 5006(a)(1) of the Internal Revenue Code (I.R.C.) of 1954 provides that the tax on spirits be determined when they are "withdrawn from bond." The determination is made on withdrawal from internal revenue bond in the case of domestic spirits and, in the case of imported spirits, on withdrawal from customs bond.

Appellants claim that the imposition of the internal revenue tax on the wine gallon basis under Sec. 5001(a)(1) discriminates against their bottled below proof spirits contrary to treaty obligations of the United States and that, under Sec. 7852(d), the provision for so imposing the tax therefore should not apply.

They regard discrimination against the spirits imported from Ireland, Irish whiskey, to be banned by the Treaty of Friendship, Commerce and Navigation between the United States and Ireland, entered into force on September 14, 1950. The portions of that treaty pertinent here are:

Article XVI (1 UST 788 at page 797):

1. Products of either Party shall be accorded within the territories of the other Party, national and most-favored-nation treatment in all matters affecting internal taxation and sale, distribution, storage and use:

Article XXI (1 UST 788 at page 801):

> 1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

As to the spirits imported from Scotland, i.e., Scotch whiskey, appellants rely additionally on the treaty between the United States and Great Britain, 8 Stat. 228, entered into force July 3, 1815. Under that treaty, products of Great Britain coming into this country are to be accorded most-favored-nation treatment with respect to "duties" levied against them.

Appellants point to the practice of domestic producers of below proof spirits, of withdrawing the spirits from bond in proof or over proof condition whereby they are subjected to tax on the proof gallon basis and then diluting them to below proof for bottling. The tax of $10.50 per proof gallon so paid is reflected in the cost of domestic spirits bottled at 86 proof, for example, to the extent of only 86 percent of $10.50, or $9.03 per wine gallon. If the foreign produced spirits are imported in bulk at proof or over proof and subsequently bottled at 86 proof, the tax is levied on the bulk spirits on the proof gallon basis just as with domestic spirits and the reflection of that tax on the ultimate bottled product amounts to $9.03 on the gallon just as that on the domestic bottled product. However, the instant imports, having been bottled in Ireland and Scotland, respectively, at 86 proof, were necessarily withdrawn from customs bond in below proof condition so that the resulting tax amounted to $10.50 per *bottled* gallon, or $1.47 per gallon more than the reflected tax on domestic or imported spirits withdrawn from bond in proof or over proof condition and then bottled in the United States at 86 proof.

Appellants' protests are grounded on the charge that the aforementioned circumstances result in discrimination

against their imported below proof bottled spirits relative to below proof bottled domestic spirits. They state that the imported Irish whiskey is entitled to national treatment within the United States under Article XVI of the treaty with Ireland, and that, under Article XXI of that treaty, "national treatment" means treatment upon terms no less favorable than the treatment accorded in like situations to products of the United States. With respect to the Scotch whisky, appellants take the position that the most-favored-nation provisions of the British treaty of 1815 "operate prospectively to encompass the benefits conferred upon products of Ireland in the National Treatment provisions of the Irish treaty, and they encompass specifically the tax here in dispute."

The Customs Court accepted the premise, conceded here by appellee, that the imports from Great Britain are entitled under the most-favored-nation clause of the British treaty to whatever tax treatment is required with respect to the imports of Irish origin. It thus found, and we think correctly, that the case comes down to whether assessment of taxes on the imported merchandise on the wine gallon basis under the stipulated circumstances is in violation of Articles XVI and XXI of the Irish treaty. It observed that the time at which the tax is determined fixes the basis of the assessment and found that "the issue turns on whether the stipulated circumstances involve 'like situations' at the time of tax determination."

In disposing of that question, the court concluded that the *bottling* of the spirits has no bearing on the "taxing event" to which both the domestic and imported products are subject, observing that Sections 5001(a)(1) and 5006(a)(1) are addressed to the spirits and not to the containers which house them. It stated:

> We cannot conclude that the rate of taxation should be the same for both domestic and foreign spirits merely because both products end up in the hands of the consumer bottled and underproof. The

> criterion on which the taxing event takes place is, with respect to the domestic spirits, the withdrawal of the spirits from bond. Under the stipulated facts at bar the imported spirits are underproof at the time of tax determination, while the domestic spirits are at or overproof at such time. It is this difference in the nature of the taxed commodity which, in our view, militates against plaintiff's claim of discrimination in violation of treaty obligation.
>
> * * *
>
> * * * Underproof imported spirits (bottled) and proof or overproof domestic spirits (bulk) at the time of tax determination do not involve "like situations," and consequently, the provisions of Articles XVI and XXI of the Irish treaty are not applicable here. * * *

The Customs Court relied on *Bercut-Vandervoort & Co. v. United States*, 46 CCPA 28, C.A.D. 691 (1958), *cert. den.*, 359 U.S. 953 (1959),[3] finding that case "not distinguished upon the relevant facts or the law from the case before the court" and held it *stare decisis* herein. It stated:

> * * * In *Bercut-Vandervoort & Co., Inc., v. United States*, *supra*, the protest considered by the United States Court of Customs and Patent Appeals involved distilled spirits which were imported underproof in bottles and on which the internal revenue taxes were assessed on the wine gallon basis. In substance, the provisions of the General Agreement on Tariff and Trade therein considered permitted, on imported products, "a charge equivalent to an internal tax" on like domestic products and prohibited the imported products of a contracting party from being "subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those

[3]The *Bercut* case was followed and found controlling in the subsequent case of *China Liquor Distributing Co. v. United States*, 52 CCPA 1, C.A.D. 847 (1964), *cert. den.*, 380 U.S. 962 (1965).

applied, directly or indirectly, to like domestic products."

Appellants concede that the provisions of the Internal Revenue Code of 1939 before this court in *Bercut* are comparable to those of Section 5001(a)(1) of the Internal Revenue Code of 1954 now before us. Also, they make no contention that the "national treatment" provision of the Irish treaty is in any way more restrictive than the similar requirements, expressed in different terms, of GATT which were found not to be violated in *Bercut*.

It is also acknowledged by appellants that Sec. 5001 appears on its face to be non-discriminatory in that it establishes two classifications proof (and above-proof) spirits and below proof spirits and applies equally to both without regard to whether they are domestic or imported. Rather, they urge that it is examination of other provisions of the law, not considered in *Bercut*, which shows that Sec. 5001 is in fact discriminatory as applied in *Bercut* and here. Those provisions are (1) Sec. 5006, I.R.C., *supra*, which provides that the tax shall be determined when the spirits are withdrawn from bond; (2) Sec. 5233, I.R.C., which provides that spirits cannot be bottled in bond below 100 proof (except spirits for export which are not subject to tax); and (3) Sec. 206(a) of the Federal Alcohol Administration Act, 27 USC 206(a), which allows only bottled spirits to be sold to the ultimate consumer. Appellants urge that these provisions were not considered in *Bercut* and that Sec. 5006 had no counterpart in the 1939 Act that the court had before it in that case, and regard them as establishing that the law does not permit domestic *bottled* spirits to be below proof at the time of tax determination. Since bottled imported spirits are the only bottled spirits to which the wine gallon tax can legally apply, they reason: the assessment of the wine gallon tax of Sec. 5001 on their bottled underproof imports is discriminatory.

Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland submitted a brief in

support of the appeal as *amicus curiae* and was represented by counsel at oral hearing. *Amicus* "accepts the premise of the Customs Court that *Bercut* 'is not distinguished [from the present case] upon the relevant facts or the law,'" but it "questions the correctness of the conclusions drawn therefrom."

More specifically, *amicus* points out that the United States undertook the obligation of GATT[4] subject to the Protocol of Provisional Application. That Protocol accepted Part II of the agreement, which part includes Article III embodying the restriction against imported products being subjected to internal taxes or other internal charges in excess of those applied to like domestic products, "to the fullest extent not

[4] The provisions of GATT, as amended (T.D. 51802 and T.D. 52167), considered in *Bercut* were quoted therein as follows:

Article II

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part; * * *

Article III

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

inconsistent with existing legislation." *Amicus* then concludes that, since the wine gallon provision was existing legislation, the same result could have been reached in *Bercut* on the basis that the Protocol rendered the national treatment provision of Part II of GATT (Article III) ineffective instead of on the grounds on which it was decided that the national treatment provision was not violated.

As evidence of error in the grounds on which *Bercut* actually was decided, *amicus* refers to the acknowledgment in paragraph 4 of Article III of GATT that internal taxes should not be applied to imported or domestic products so as to "afford protection to domestic production." It then refers to proceedings and documents concerned with the proposed Customs Simplification Act of 1951 (H.R. 1535). That material[5] indicates that the executive branch of the government proposed the elimination of the wine gallon provisions of the Internal Revenue Code and that certain officials apparently regarded those provisions in derogation of the intent of GATT to avoid internal tax discrimination against imported goods. *Amicus* and appellants also point to testimony of certain representatives of domestic producers of spirits, and appellants also to testimony of the Resident Commissioner of Puerto Rico, opposing the elimination of the wine gallon provision as indicating that such elimination would amount effectively to a reduction in the import duties for foreign shippers of cased whiskey. *Amicus* also asserts that, besides itself, "the Common Market, consisting of France, Germany, Italy, Belgium, Luxembourg and the Netherlands," and Canada have "protested the United States excise tax system for spirits imported in bottles (wine gallon) as being contrary to Article III of GATT."[6]

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[5]The material is derived largely from *1951 House Simplification Hearings* although reference is also made to *1951 Senate Trade Extension Hearings* (Feb. 22 - Apr. 6, 1951).

[6]*Amicus* also refers in a footnote to its brief to "a critical study of *Bercut* in which the conclusions reached support the analysis here made and the position of this brief" in 61 *Columbia Law Review*, 549-551.

We think the Customs Court was plainly correct in regarding the decision in *Bercut* as compelling the conclusion it reached here. Not only is the language in Sec. 5001 equivalent to that in Sec. 2800 of the 1939 Act considered in the earlier case but the covenants in the Irish treaty are no more restrictive than those of GATT which were considered in *Bercut*.

Appellants' reliance here on Sec. 5006 and Sec. 5233 of the I.R.C. of 1954 and Sec. 206(a) of the Federal Alcohol Administration Act as establishing that the law does not permit domestic bottled spirits to be below proof at the time of tax determination does not demonstrate that the present case is distinguished from *Bercut* in any significant respect. As a matter of fact, it was assumed arguendo at the outset in *Bercut* that it was the "universal practice" of domestic producers to withdraw spirits from bond when over proof, and thus pay tax on the proof gallon basis, before diluting them. Thus *Bercut* was in no way premised on a view that domestic under proof spirits would or could ever be subject to the internal revenue tax in that condition.[7]

Neither do we find any significance in the contention of *amicus* that *Bercut* might have been decided with the same result on the basis of the adherence of the United States to GATT having been provisional under the Protocol of Provisional Application. The case was actually decided on the broader rationale that application of the wine gallon provisions of the 1939 Internal Revenue Code did not discriminate against imports of bottled under proof spirits under the national treatment provisions of GATT.

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[7] The parties are apparently in agreement that it is legally possible that bottled domestic belowproof spirits could be subjected to taxation on the wine gallon basis. Domestic spirits intended for export (tax free) can be bottled in bond as low as 80 proof. *If* spirits so processed were subsequently diverted to the domestic market instead of being exported, they would be subject to tax on the wine gallon basis.

The decision in *Bercut* was reached after thorough consideration of the precedents, including the only case which appellants now advance holding that underproof spirits should be subjected to internal revenue tax on the proof-gallon, rather than wine gallon, basis. That case, *Parrott & Co. v. United States*, 156 F.2d 943 (CA 9, 1946) involved interpretation of a provision of the Internal Revenue Code of 1918 providing that there be levied, collected and paid "upon articles coming into the United States from the Virgin Islands, a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture." The court found the quoted provision to require that underproof rum, which was alleged to have been distilled in the Virgin Islands at more than 100 proof, be taxed, *not as an importation*, but "as if produced in the United States." We think the court in *Bercut* was correct in distinguishing that case, where the sole issue was interpretation of language of the tax law and that language was entirely different from the prohibatory language of Article III, section 2, of the trade agreement involved in *Bercut*.[8]

The arguments that the unsuccessful attempt of officials of the executive branch of the government in 1951 to persuade Congress to eliminate the wine gallon provisions of the Internal Revenue Code, with certain of the officials urging the change as a means to insure compliance with GATT, and that persons opposing the proposed change referred to it as amounting to a reduction in the protection afforded the domestic (including Puerto Rican) spirits industry, are not considered sufficiently indicative of discrimination to justify overruling *Bercut*. It is of course apparent how foreign producers would find the elimination of the wine gallon provision desirable and it is also understandable that some United States government officials might consider it in the best interests of international trade cooperation to do away with an aspect of the Internal Revenue Code that may well be an irritant to foreign trade negotiators. It is

[8] See note 4.

significant to note that there is no history of the GATT negotiations of record to show that that treaty was regarded as compelling the abrogation of a United States tax provision having a long prior history.[9] What is of record does not clearly establish that *Bercut* was in error, and therefore the principle of *stare decisis* dictates that we should not reverse ourselves. See *R. J. Saunders & Co., Inc. v. United States*, 54 CCPA 29, C.A.D. 898 (1966).

Referring specifically to the present case, the classification of spirits for internal revenue purposes in the two categories of proof gallon and wine gallon amounts but to a continuation of a practice long established at the time Congress passed the 1954 Internal Revenue Act specifically continuing it. The Irish treaty was already in force at that time. It is apparent that Congress had knowledge through the hearings on the Customs Simplification Act of 1951, discussed at length by appellants and *amicus*, of the controversy relating to the application of the wine gallon tax to bottled imported underproof spirits. In those circumstances, we cannot conceive that Congress, in including in the 1954 Internal Revenue Code, Sec. 7852(d), denying effect to provisions "contrary to any treaty obligation," intended it to apply to the express provision for the wine gallon rate in Sec. 5001.

The rationale of the protests against the customs duty imposed on the imports under item 168.45, Tariff Schedules of the United States, depends upon the proposition that the quantities of spirits on which the internal revenue tax is applied should be adjusted[10] because the applications of the

[9] As noted in *Bercut*, the classification of spirits at proof (or above proof) gallon and wine gallon "were established by the Congress in 1868 for purely domestic purposes and have been retained in substance each time the Congress has considered this subject. 15 Stat. 125 (1868); Rev. Stat. §3251 (1875); 40 Stat. 1105 (1919) as amended, 26 U.S.C. §5000(a)(1)."

[10] See the terms of the amendment to the protests, quoted, *supra*. CA-5339.

latter tax on the wine gallon basis was improper. Since we find no basis for such an adjustment, the propriety of the Customs Court's allowing amendment of the protests need not be considered in reaching the conclusion that the protests against the customs duties were properly disallowed.

The judgment of the Customs Court is affirmed.

AFFIRMED